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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Via hand delivery

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D. C. 20554

Re: CC Docket No. 02-33

Dear Ms. Dortch:

On October 22, 2002, Praveen Goyal and Jason Oxman of Covad Communications, met with Elizabeth Yockus, Harry Wingo, Richard Horey, Jeremy Miller, Cathy Carpino, Tom Navin, Brent Olson, and Rob Tanner to discuss the Broadband proceeding. Covad's points are summarized in the attached presentation

Respectfully submitted,

Florence Grasso

Cc: Elizabeth Yockus
Harry Wingo
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Linesharing and the Broadband-NPRM

Jason Oxman

Praveen Goyal

October 22, 2002

In the first instance, the Broadband NPRM is unnecessary and creates uncertainty.

- The Commission should not adopt its tentative conclusions, because of the legion of consequences (intended or unintended) that flow from it.
 - Opposition from the states, the Department of Defense, Department of Justice, GSA, Small Business Administration, disabilities community, among others.
- Section 10 forbearance authority is exactly how Congress intended the Commission to eliminate rules that are no longer necessary -- the Commission should simply forbear here.
- Section 10 forbearance would provide all of the relief that the Bells have asked for in this proceeding, except unbundling relief, which should be granted (if at all) in the Triennial Review, not this proceeding.
- Litigation risk if Commission is not absolutely clear that regulatory classification of BOC retail DSL services has no impact whatsoever on UNEs.



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Even if the Commission adopts its tentative conclusions, linesharing is still preserved.

- Primary question asked in the Broadband NPRM: “We analyze whether wireline broadband Internet access service provided over the provider’s own facilities is an information service, a telecommunications service, or both.” Wireline Broadband NPRM at ¶ 24.
 - FCC inquiry appears to be into retail services offered by the companies that own their own loop facilities -- i.e., the Bells. But there could be misinterpretations of this conclusion.
- Three possible service classifications under the 1996 Act:
 - (1) telecommunications – a transmission pathway (DSL, ATM, frame relay, T-1, POTS service)
 - (2) telecommunications service – telecommunications, provided to the public or such class of users as to constitute the public, for a fee.
 - (3) information service: telecommunications + computer-generated information, such as provided by an ISP. In other words, telecommunications + ISP = information service



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Tentative conclusion that BOC retail DSL services are information services applies only to the BOC retail DSL offerings

- "[W]e tentatively conclude that providers of wireline broadband Internet access service offer more than a transparent transmission path to end-users and offer enhanced capabilities. Thus, we tentatively conclude that this service is properly classified as an "information service" under section 3 of the Act. We base this tentative conclusion on the fact that providers of wireline broadband Internet access provide subscribers with the ability to run a variety of applications that fit under the characteristics stated in the information service definition." NPRM at paragraphs 20-21.
 - In other words, BOC retail DSL services sold to end users as a bundled DSL + ISP offering are information services, because they are a combination of telecommunications + ISP services. So long as the BOCs have no standalone DSL transmission service offering, they have no common carrier offering.
- The Commission's tentative conclusion applies to BOC DSL services only, not CLEC DSL services, because CLEC DSL is a transmission service provided on a common carrier basis to dozens of other carriers and ISPs.
 - The Commission would conclude that BOC DSL services are not common carrier services (i.e. not telecommunications services), because the BOCs provide them on a private carriage basis only to themselves, and thus have no telecommunications service offering. This holding would not apply to Covad, which sells DSL telecommunications services on a common carrier basis to hundreds of ISPs and carriers.



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Covad's DSL transmission service is still a telecommunications service.

- “In addition, we tentatively conclude that the transmission component of retail wireline broadband Internet access service provided over an entity's own facilities is “telecommunications” and not a “telecommunications service.”” Wireline Broadband NPRM at 17.
- In short, this tentative conclusion applies to carriers that provide broadband over (a) last mile facilities that the carrier owns (facilities ownership was the genesis and hallmark of the CI II/III rules), and (b) do not provide such services to the public (and thus do not provide a “telecommunications service”).
- Neither (a) nor (b) applies to Covad, which (a) leases the last mile, but does not own its own transmission facilities, and (b) provides broadband to the public as a common carrier (ISPs, other carriers, and end users).

Classification of BOC retail DSL services as information services does not mean the retail services Covad provides are information services.

- When a carrier provides DSL transport service to an ISP or carrier it is providing a regulated, basic telecommunications service. This is true whether or not the entity providing the service is an ILEC or CLEC, or even whether the ISP is an integrated, affiliated, or unaffiliated ISP. In this scenario, the ISP is a consumer of DSL service. Then, the service provisioned to the end-user by the ISP is a non-regulated information service.
 - BOC retail DSL is: DSL transmission service (telecommunications) + BOC ISP service = information service. BOC DSL transmission input is telecommunications, not a telecommunications service, if BOC is not offering its DSL as a common carrier.
 - Covad DSL is: transmission service offered to the public, such as to ISPs (both Covad.net and independent ISPs), end users, and other carriers = telecommunications service.
 - Covad DSL provided on a common carrier basis to AOL, Earthlink, AT&T WorldNet, Sprint, WorldCom, Covad.net, SBC, among hundreds of other ISPs and carriers.



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Commission precedent holds that DSL transmission services are telecommunications services.

- The Commission has concluded on numerous occasions that DSL services, provided on a common carrier basis, without the ISP component, are telecommunications services. Commission has already concluded that DSL services, provided to ISPs, are telecommunications services:
 - Example: "Moreover, we agree with NTIA that although bulk DSL services sold to Internet Service Providers are not retail services subject to section 251(c)(4), these services are telecommunications services, and as such, incumbent LECs must continue to comply with their basic common carrier obligations with respect to these services." Advanced Services Resale Order, CC Docket No. 98-147, FCC 99-330 at 21.
- Broadband NPRM recognizes this precedent and notes "our prior conclusion that an entity is providing a "telecommunications service" to the extent that such entity provides only broadband transmission on a stand-alone basis, without a broadband Internet access service." Broadband NPRM at 26.
- Commission reached the same conclusion in Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 24012, 24029, para. 35 (1998) (finding that advanced services such as xDSL constitute telecommunications services when offered to the public directly or on a stand-alone basis)



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Linesharing is still a UNE, even if BOC retail DSL is an information service.

- Section 151 of the Act defines "network elements" as including "facilities used in the provision of a telecommunications service." Classification of ILEC DSL transmission input as "telecommunications" and not "telecommunications service" does not prevent unbundling of loops used to provide broadband services, because loops are still "used in the provision of" telecommunications services, like POTS, T-1, DSL offered as a telecommunications service by CLECs, etc. This is true of the upper frequencies of loops as well, which can be used to provide a telecommunications service, regardless of whether the BOCs choose to or not.
- Section 151 also includes in the definition of network elements all of the "features, functions, and capabilities" of the loop. This includes frequencies of the loop, specifically the upper frequencies. Thus, so long as the loop itself is a UNE, the features, functions, and capabilities of that loop (including its frequencies) fall within the definition of the loop UNE.
 - The Commission's conclusion that linesharing is a network element was specifically affirmed by the D.C. Circuit in *USTA v. FCC*.



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Section 251(c)(3) is also satisfied by linesharing unbundling, regardless of the classification of BOC retail DSL services.

- Section 251(c)(3) permits CLECs to access UNEs to provide a "telecommunications service." FCC must classify CLEC DSL services as "telecommunications services" in order to preserve section 251(c)(3) access to UNEs. Covad's broadband offerings are clearly telecommunications services, because they are offered on a common carrier basis.
- Classification of BOC retail DSL services cannot be permitted to dictate classification of CLEC DSL services. If it were otherwise, Covad could only purchase a loop that was already being used to offer a telecommunications service, not an idle loop, and could only purchase a loop being used to provide the same telecommunications service as Covad provides.
- The Act does not require the unbundling of only those network elements that the ILECs actually use to provide telecommunications services. If that were the case, all CLECs would be mere mirrors of the ILECs - CLECs would only be entitled to provide the exact same retail services as the ILECs. This unbundling obligation is not eliminated for CLEC customers who use elements to provide services different from those provided by the ILECs, or to provide service differently than the ILEC provides service.



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Even where Covad sells DSL transmission service to its own ISP, linesharing is still a UNE.

- When carriers, such as Covad, offer transport using DSL-based technologies, and sells that transport to ISPs, carriers, or end users (in other words, the public), those transport services constitute "telecommunications services."
- Covad's affiliated ISP is simply another member of the "public" that is purchasing service from Covad. The mere fact that Covad has an affiliated ISP does not transform the nature of Covad's service offerings -- they are still common carrier offerings.
- The conclusion does not vary if the ISP is affiliated with the CLEC, so long as the carrier offers service generally to the public (of which its own affiliated ISP is a member). Accordingly, CLECs are "requesting carriers" under section 251(c)(3), using loops or the high frequency portion of the loop to provide "telecommunications service." If the ILECs choose not to provide retail telecommunications services based on DSL technology, that is their prerogative. But the ILECs' decision does not affect Covad's ability to purchase UNEs from the ILECs, including lineshared loops.



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NARUC common carrier analysis is subject to Commission discretion

- Common carrier services can be offered to customers at different terms and conditions, so long as they are just and reasonable differences.
 - **See 47 U.S.C. § 201(b)** ("communications ... may be classified into ... such [] classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications").
- "The phrase "effectively available directly to the public" can be reasonably read instead as reflecting the NARUC I court's emphasis that "carriers need not serve the whole public" **to be classified** as common carriers. NARUC I, 525 F.2d at 642 (citation omitted). The court, after stating that "[w]hat appears to be essential to ... the common carrier concept is that the carrier 'undertakes to carry for all people indifferently,' " id. at 641 (citation omitted), stressed that "[t]his does not mean that a given carrier's services must practically be available to the entire public." Id. The court then added, "It is not necessary that a carrier be required to serve all indiscriminately; it is enough that its practice is, in fact, to do so." Id."
 - *Virgin Islands Telephone Corp. v. F.C.C.*, 198 F.3d 921, 926 C.A.D.C., 1999.
- Given that the statute's distinction between "directly available to the public" and "effectively available directly to the public" can be read as reflecting the NARUC I court's distinction between serving the entire public and serving only a fraction of the public, it is reasonable to read the statute as adopting the NARUC I framework.
 - Id.



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Legislative history of the Act support this interpretation.

- “The term “network element” was included to describe the facilities, such as local loops, equipment, such as switching, and the features, functions, and capabilities that a local exchange carrier must provide for certain purposes under other sections of the conference agreement.”
 - P.L. 104-104, TELECOMMUNICATIONS ACT OF 1996, SENATE REPORT NO. 104-230, February 1, 1996.
- “The term “telecommunications service” is defined as those services and facilities offered on a “common carrier” basis, recognizing the distinction between common carrier offerings that are provided to the public or to such classes of users as to be effectively available to a substantial portion of the public, and private services.”
 - P.L. 104-104, TELECOMMUNICATIONS ACT OF 1996, SENATE REPORT NO. 104-230, February 1, 1996.